In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 998

TREY PACKING, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. On facts adequately summarized in the court of appeals' opinion (Pet. App. 3a-7a), the Board found that Trey Packing, Inc. had violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees about union matters, after receiving a request for union recognition; by requesting an employee to solicit other employees to withdraw from the Union; by threatening reprisal for union activities; and by promising benefits for refraining from union activity. The Board also found that the Com-

pany had discriminatorily discharged two union adherents in violation of Sections 8(a)(3) and (1) of the Act. Finally, the Board found that the Company's refusal to bargain with the Union, which represented a majority of the employees, was not prompted by a good faith doubt as to the union's majority, and thus violated Section 8(a)(5) and (1) of the Act. The Board ordered the Company to cease and desist from the unfair labor practices found; to offer reinstatement to the two discharged employees and to make them whole for any loss of earnings they may have suffered because of the discrimination; and to bargain with the Union upon request (Pet. 3a). The court of appeals found the Board's decision "supported by substantial evidence" (Pet. App. 8a), and enforced its order.

2. The contention (Pet. 5-6) that officials of the Company were "entrapped" when employee Trexler and his wife solicited their views respecting the Union was properly rejected by the court below. As the court pointed out (Pet. 9a), "we can by no stretch of the imagination consider Trexler to have been an agent of the government while he was discussing the Union." The court added that "in light of the Company's other illegal conduct * * * we cannot attach great weight to its argument that but for Trexler's inducement, [the Company] would not have been likely to engage in the faulted conduct."

Petitioner's contention (Pet. 7-9) that the court below violated its "legal rights" by setting a date for oral argument which precluded it from studying the Board's brief and presenting a reply brief is equally

insubstantial. The court afforded petitioner an opportunity to file a reply brief after the argument (Pet. 9). Moreover, petitioner could have petitioned for rehearing, but failed to do so.

Petitioner's remaining contention is that "the Second Circuit has * * * issued an order to enforce bargaining as an automatic punishment for an unfair labor practice despite the good faith doubt" (Pet. 7), in alleged conflict with the Fourth Circuit rule now before this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, Nos. 573 and 691, this Term, certiorari granted, December 16, 1968. Under the Fourth Circuit's rule, an employer claim of good faith doubt that a union has attained majority status through solicitation of authorization cards is held to be presumptively valid, in view of the alleged "inherent unreliability" of such cards, and therefore employers claiming such doubts may not be found unlawfully to have refused to bargain when presented with a union demand for recognition and bargaining based upon cards. As was not true in the Fourth Circuit cases refusing enforcement of bargaining orders, however, the Trial Examiner here found that "at no time after the bargaining demand did [the Company] inform the Union that it doubted its majority status" (Pet. App. in the court of appeals, 38a). Since no good faith doubt was claimed in dealings with the Union, no circuit would have refused to enforce the Board's bargaining order. Compare *National Labor Relations* v. *Sehon Stevenson & Co.*, 386 F.2d 551 (C.A. 4). The reliability of the authorization cards

in this case was never put in question.[1] Therefore, there is no occasion here for the Court to postpone its consideration of the instant petition until its decision in *Gissel*.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

FEBRUARY 1969.

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[1] Petitioner rests its claim of good faith doubt on two factors: (1) three of the five employees in the unit expressed doubt as to their union allegiance *prior to* the Company's illegal acts; and (2) there was a question as to the size of the unit (Pet. 6). However, the Board found that the defections occurred after, and as a result of, the Company's illegal conduct. Moreover, since the Union had cards from three employees, it was irrelevant whether four or five drivers were included in the unit.

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